DOCUMENT RESUME

ED 162 373 CS 502 293

AUTHOR Rohrer, Daniel Morgan
TITLE Censorship and the Media.
PUB DATE 79
NOTE 33p.; Study prepared at Boston College

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS Adults; *Censorship; Child Abuse; *Community Attitudes; Community Control; *Court Cases; Freedom of Speech; *Mass Media; Media Research; Moral Issues; *Publications; Radio; Television
IDENTIFIERS *Obscenity

ABSTRACT

This review of current legal practices with respect to censorship in the areas of obscenity and pornography contains a history of anti-obscenity legislation; a review of the efforts of the United States Supreme Court and lower courts to define obscenity; a discussion of publisher Larry Flynt's battle against the "community standards" criterion for defining obscenity; a discussion of the self-regulation efforts of the radio and television media; a consideration of the problems of obscenity and pornography on billboards; and an examination of child pornography laws. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Daniel Morgan Rohrer

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED162373

Censorship and the Media

by Daniel Morgan Rohrer

Department of Speech Communication

Boston College

Introduction

In February 1970, Jerry Garcia, the Grateful Dead's leading exponent of freedom of speech, uttered a four-letter word while being interviewed on Philadelphia's noncommercial educational radio station, WUHY. Someone complained to the FCC and eventually that station was forced to pay a $100 fine.

Seven years later the Federal Appeals Court of Washington, D.C. reversed a similar FCC decision, ruling that such language should receive First Amendment protection even on the air waves when children might be listening. In March 1977, U.S. Circuit Judge Edward A. Tamm said the FCC order was too broad and carried the agency into the "forbidden realm of censorship". In this case words, ranging from three to 12 letters in length and describing various sexual activities and portions of the female anatomy or excretory functions of the body, were aired in December 1973 on a New York radio station when it broadcast a record of a comedy routine by comedian George Carlin (Pacifica Foundation v. FCC, 556 F.2d 9 (CADC 1977)). In the summer of 1978 the United States Supreme Court upheld the original FCC ruling banning the broadcast of Carlin's "offesive" words over the air waves where they might be heard involuntarily by America's unwitting youth.

CS 503 293

History

All levels of government in the United States have promulgated laws designed to protect the public from the dissemination of immoral or depraved matter. These acts encompass both administrative regulation and criminal prohibition. In reviewing cases arising out of such anti-obscenity statutes, the courts (with few exceptions) were long guided by the British precedent in Queen v. Hicklin. Lord Chief Justice Cockburn noted in that case that the test for obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort might fall". This standard, basing societal guidelines upon the most corruptible, is so broad that it renders First Amendment rights virtually inapplicable in obscenity cases.[1]

It was not until 1957, in Roth v. United States (354 U.S. 476 (1957)), that the Supreme Court began to establish more sophisticated criteria for identifying obscenity. In that case Justice Brennan articulated for the majority that expression is obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests".[2] Thus obscenity was no longer to be appraised with respect to the most susceptible, but rather to the average, member of society.

The guideline, however, remained vague, and in later years the Court sought to explicate it. In Manual Enterprises v. Day (370 U.S. 478 (1962)), it held that obscene matter must not only cater to prurient interests, it must be "patently offensive" as well. In

Jocabellis v. Ohio (378 U.S. 184 (1964)), it further ruled that expression which has literary or scientific or any other form of social importance may not be branded as obscene. An additional criterion for determining obscenity was announced in Ginzburg v. United States (383 U.S. 463 (1966)). By evaluating the claims of the publisher of Eros and other erotic literature to First Amendment protection, the Court introduced the notion of intent, stating that "where the purveyours' sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity".

Although the Court has sought properly to confine the scope of anti-obscenity legislation, current efforts are unsuccessful in clarifying poetic license; they compel jurists to enter the thicket of literary criticism. Judges are asked to consider questions of taste and artistic merit that have baffled critics for centuries. The most profound philosophers of art have foundered whenever they attempted to abstract the essence of good art. The contribution of the Supreme Court to this endeavor has been a collection of empty generalities that offer scant guidance in difficult cases.

Once sex is recognized as a valid aspect of artistic expression, it becomes virtually impossible to draw lines. Other nations have eliminated censorship legislation for adults, and the United States is faced constantly with the challenge of emulating such decisions.

In its obscenity discussions, the Supreme Court has acted, however, to shield the individual from the actions of administrative censorship agencies. The case of Freedman v. Maryland (380 U.S. 51 (1965),) for example, held that only a judicial tribunal has the power to exercise final restraint on free expression. Thus provision must be made for judicial review of administrative decisions in First Amendment cases.[4]

The extent of such judicial review can be seen in the decision of the U.S. Supreme Court to hear a case that could once and for all answer the question of whether the government is permitted to bar indecent language on the public airwaves. It is the case involving New York City's radio station WBAI which chose to broadcast indecent language when it carried comedian George Carlin's monologue on "The seven words you can't say on television". As was indicated above, the U.S. Court of Appeals overruled the FCC in the spring of 1977, claiming that the agency's anti-indecency guidelines were unclear, and that the FCC had improperly engaged in censorship. In July 1978 the high Court reinstated the original FCC prohibition, as was also acknowledged above.

To better understand the dilemma faced by the Supreme Court on this issue, perhaps it would be helpful to trace the circle drawn by the Court between 1966 and 1977 on the question of the advertising and promotion of obscenity and pornography.

In 1966 the so-called liberal and progressive Warren Court upheld the obscenity conviction of Ralph Ginzburg. The court analyzed the advertising and promotion for Mr. Ginzburg's publications and ruled that in "close cases" evidence of "pandering", or appealing to prurient interests, could determine whether doubtful material was obscene or not (Ginzburg v. United States, 383 U.S. 463 (1966)).

This decision evoked much criticism. Mr. Ginzburg was something of a celebrity, his sentence was severe, and by the time it was finally confirmed, many people had concluded that his wares were not terribly offensive.[4] Indeed, for the following eleven years there is little sign of a similar reaction on the part of the Court which would parallel such an aphorism. Quite the opposite was to transpire during that period of time.[5]

After the Warren Court became the Burger Court, a majority of five Supreme Court Justices, including the Court's four Nixon appointees, changed the definition of obscenity. Prior to their new ruling in Miller v. California on June 21, 1973, obscene material was held protected by First Amendment guarantees unless the work, taken as a whole, was found to: 1. appeal to the prurient interest, 2. exceed the standards of candor in the representation of sexual matters, and 3. be "utterly without redeeming social value", (Roth v. United States / Alberts v. California, 354 U.S. 476; Memoirs v. Massachusetts, 383 U.S. 413 (1966)).

This test of obscenity was established in Roth v. United States, supra. Under this definition, as elaborated in subsequent cases, the three elements must coalesce. For example, "a book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal Constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness "(Memoirs v. Massachusetts, supra). "Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute "(Stanley v. Georgia, 394 U.S. 557 (1969)).

Between 1973 and 1977, however, to be defined as obscene, the work, taken as a whole, had to: 1. appeal to the prurient interest, 2. portray sexual conduct in a patently offensive manner, and 3. be lacking in any serious literary, artistic, political, or scientific value (Miller v. California, 413 U.S. 15 (1973)). Although questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact, ... it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is 'patently offensive'" (Jenkins v. Georgia, 418 U.S. 153 (1974)).

Indeed, the justices were quite specific about what they meant by "patently offensive": ultimate sexual acts, masturbation, excretion, and lewd exhibition of genitalia. The other two criteria they left open to interpretation. They also ruled in Miller that obscene materials would have to be assessed in terms of "community standards". This innocuous term concealed a trap, for the court failed to specify whether "community" meant the judicial district from which the jurors were selected and in which the trial was held, or an abstract concept encompassing what was morally acceptable to the average American.[6]

Lower courts have attempted to make such a distinction nevertheless. For example the case of United States v. Various Articles of Obscene Merchandise (3 Med. L. Rptr. 1116, 562 F2d 185 (CA2, 1977)) resulted in a federal court determination that material must be found obscene within local community standards of the district in which the material was seized, rather than within community standards of the district in which the addressee of the material resides.

The case of Smith v. United States (431 U.S. 291 (1977)) clarifies further that whether the work depicts or describes, in a patently offensive way, sexual conduct, must be determined on the basis of specific definitions within applicable state law.

A similar interpretation was made in the state court of Michigan. Here it was decided that where there is a conflict between local ordinances and state statutes, the latter are dispositive in defining community standards for obscene material (People v. Llewellyn , 401 Mich. 314, 257 N.W. 2d 902 (1977)).

In cases where neither state law nor local ordinances may define specifically all obscene matter which is found by the court to violate community standards, past court precedent within the state may serve as an equally valid mechanism for defining material that will be prohibited (Ward v. Illinois, 431 U.S. 767 (1977)).

Despite such distinctions drawn by the lower courts, government attorneys have gone venue-shopping by selecting a location where obtaining a conviction is likely. It is thus that Al Goldstein, who publishes Screw magazine in New York, found he was going to be tried in Wichita, and Harry Reems, a New York actor, came to be on trial in Memphis.

In the spring of 1976 the publisher of Screw magazine was found guilty of distributing obscene materials through the mails. The star of "Deep Throat", however, was more fortunate. After his conviction early in 1976 on charges of conspiring to transport obscene material across state lines, a federal district court judge wrote an eight

page order in April 1977 claiming that Mr. Reems deserved another chance in court because his activities in the sexually explicit film had taken place prior to the Supreme Court ruling on obscenity in 1973. Such a condition was insufficient to save Ward, however (supra).

The standards set forth in that ruling were followed by the jury that convicted Reems on May 1, 1976, of conspiring to distribute the film nationally. He was acquitted of charges that he actually took part in transporting the film across state lines from Fort Lauderdale, Florida, to Memphis, where the trial was held.

However, Larry C. Flynt, publisher and editor of Hustler magazine, was convicted in Cincinnati on February 8, 1977 on charges of pandering obscenity and participating in organized crime. This case, now on appeal, is expected to provide a major test of whether communities may dictate their own obscenity standards and indirectly set standards which are nationwide.

The problem is that in Memphis, Wichita, and Cincinnati the court attempted to superimpose its own local, community standard on the nation as a whole, precisely the effect the Supreme Court had attempted to circumvent in its 1973 Miller v. California decision. In the Miller case the high Court put aside a national standard for determining what is obscene and recognized that community standards of a small town in upstate New York were no more similar to the standards of New York City than the standards of Maine were to those of Las Vegas.

Having already been victimized by uncertainty over the Miller community standard, Larry Flynt announced on December 3, 1977, in a Speech Communication Association of America convention program, that he intended to return to Cincinnati to sell personally one more copy of Hustler magazine before the nature and character of the publication changed. Flynt's intent was to test the First Amendment on the merits of his original publication so that no one could argue validly that his religious conversion and the proposed changes in his publication constituted an effort to stay out of prison.[7]

Although Flynt acknowledged that he had not changed into a traditional Christian, speaking of his Hustler magazine he claimed that: "We will try to do what God would approve of in our stories and pictures."[8] Five days later he was shot and wounded critically while on trial in Lawrenceville, Georgia.[9] The judge declared a mistrial.

In many ways a case of socially redeeming value can be made for Flynt and his publication. The pornography publisher explained during his SCA convention program that he had gone to the White House and offered President Carter one million dollars to implement a national study on the effects of obscenity and pornography.

Flynt further explained in his SCA convention program that he felt so-called obscene and pornographic publications are a symptom rather than a cause of man's inability to cope with sex. Furthermore, he argued that Hustler magazine is the "poor man's art". It is intended for the uneducated and uncultured person who has a First Amendment right to media entertainment becoming to his taste, whatever it may be.

The publisher of Hustler has engaged in other "morality" campaigns ranging from an attempt to reopen the Warren Commission Study on the assassination of President John F. Kennedy to full page advertisements in major newspapers promoting world peace, an end to hunger, and a tribute to Hubert Humphrey for his position on civil rights, peace, and human dignity. Entitled "You Taught Us Not to Hide Our Feelings", one such public service advertisement appeared in the Boston Sunday Globe on December 18, 1977.[10]

Numerous attempts to achieve some form of socially redeeming value have appeared in Hustler magazine. On one occasion a public service advertisement was printed for the purpose of defining Larry Flynt's concept of obscenity. It was an emotion packed picture of a defigured GI, something perfectly acceptable in a newspaper or news magazine.

The November 1977 issue of Hustler provides a lucid example of a lack of pandering combined with worthwhile social service. The front cover is an excellent illustration of the former, and the back cover constitutes a still more impressive sample of the latter.

Unfortunately for Flynt, because the cases against him may now be moot, the courts may find some difficulty equating socially redeeming value with the new serious literary, artistic, political, or scientific value criteria established as one of the Miller standards. Indeed it may very well be that there are no clearly definable, permissible limits on obscenity and pornography.

Perhaps it is for this reason that the Supreme Court turned another summersault in 1977 when it handed down several more decisions on the subject. In the case of Marks v. United States, a new application was made to the "Miller Standards". Stanley Marks and others had been charged with several counts of transporting obscene materials in interstate commerce. Like the case of Harry Reems, the offenses in this case took place before the Miller decision was handed down, which may explain why the court returned to the Memoirs, "utterly without redeeming social value" criterion (430 US 188 (1977).

While the Supreme Court found retroactivity sufficient to rule for the defendant in the case of Marks, this defense was insufficient in the similar case of Ward v. State of Illinois. Prior to the decision in Miller v. California, Wesley Ward was convicted of selling obscene sado-masochistic materials in violation of the Illinois obscenity statute forbidding the sale of obscene matter and providing that "(a) thing is obscene if, considered as a whole, its predominant

appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, or anything that exceeds substantially the customary limits of candor in description or representation of such matters". The conviction was affirmed after Miller, the Illinois Supreme Court rejecting the appellant's challenge to the constitutionality of the statute for failure to conform to Miller standards, as well as his claim that the publications in question were not obscene.

The Court held its ground in applying pre-Miller standards to pre-Miller offenses, not withstanding the fact that Miller standards also apply. The court ruled that the Illinois statute is not unconstitutionally vague as failing to give the appellant notice that materials dealing with the kind of sexual conduct involved here could not be legally sold in the state. This is true whether or not the state has complied with Miller's requirement that the sexual conduct that may not be depicted must be specifically defined by applicabe state law as written or authoritatively construed. The high Court concluded that the appellant had ample guidance from a previous decision of the Illinois Supreme Court, making it clear that his conduct did not conform to Illinois law.

The high Court further ruled that sado-masochistic materials are the kind of materials that may be proscribed by state law, Mishkin v. New York (383 U.S. 502), even though they were not expressly included within the examples of the kinds of sexually explicit representations that Miller used to explicate the aspect of its obscenity definition dealing with patently offensive depictions of specifically defined sexual conduct.

The court also concluded that the materials in question were properly found by the courts below to be obscene under the Illinois statute, which conforms to the Miller standards, except that it retains the stricter "redeeming social value" obscenity criterion announced in Memoirs v. Massachusetts.

Finally, it was determined that the Illinois statute is not unconstitutionally overbroad for failure to state specifically the kinds of sexual conduct the description or representation of which the state intends to proscribe, where it appears that in prior decisions the Illinois Supreme Court, although not expressly describing the kinds of conduct intended to be referred to under the Miller guideline requiring inquiry "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," expressly incorporated such guidelines as part of the law and thereby intended as well to adopt the Miller explanatory examples, which gave substantive meaning to such guidelines by indicating the kinds of materials within its reach (431 US 767 (1977)).

Such an explanation fails to exist in the case of Splawn v. California, however. Here the petitioner, who was convicted of selling obscene films in violation of California law, contended that portions of the instructions to the jury violated his First and Fourteenth Amendment rights, claiming that the instructions: 1. allowed the jury to convict him even though it might otherwise have found that the film was protected under the standards of Miller v. California because the instructions permitted the jury to consider motives of commercial exploitation on the part of persons in the

chain of distribution other than the petitioner himself, and 2. violated the prohibition against ex post facto laws, as well as the fair-warniing requirement of Bouie v. Columbia (378 U.S. 347). The challenged instruction permitted the jury, in determining whether the film was utterly without redeeming social importance, to consider the circumstances of the sale and distribution, particularly whether such circumstances indicated that the film was being commercially exploited for the sake of its prurient appeal.

The high Court held that the instruction violated no First Amendment rights of the petitioner. The circumstances of distribution of the material are relevant from the standpoint of whether public confrontation with potentially offensive aspects of the material is being forced and are "equally relevant to determining whether social importance claimed for the material in the courtroom was, in the circumstances, pretense or reality-- whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes..."(431 US 595 (1977)). The Court grounded its reasoning on the Ginzburg v. United States decision which had been handed down eleven years earlier as a shocking and unexpected exception to the Court's trend and predisposition of the time.

In Splawn the Court completed its eleven year cycle on the same note. Justice Stevens, with whom Justice Brennan, Justice Stewart and Justice Marshall joined in dissenting, stated the significance of the majority decision well when he wrote:

"I would not send Mr. Splawn to jail for telling the truth about

his shabby business." In a footnote these justices further recorded their dissent from the Court's disposition of the petitioner's ex post facto argument (ibid).

While the 1973 Miller decision has proven to be counterproductive in significant instances where the Supreme Court has failed to ignore it altogether, at least one survey found that the Miller decision has failed to spur convictions on "smut". Based on 542 responses to 1,320 questionnaires sent to federal and local prosecutors across the country, nearly 80 percent of the prosecutors who responded felt that obscenity had adverse and harmful effects on society. Yet nearly 30 percent said that they placed a lower priority on obscenity prosecutions now than their offices had in 1971 --two years before the Supreme Court's decision. Only 13 percent said they were giving obscenity prosecutions a higher priority, and the rest said there had been no change.[11]

The question thus arises as to whether some kind of harm derives from so-called obscene publications or picture shows. This issue has been addressed from time to time in various reports and investigations. The Report of the Commission on Obscenity and Pornography provides the reader with conclusions based upon a national survey of American adults and youth which involved face-to-face interviews with a random probability sample of 2,486 adults and 769 young persons between the ages of 15 and 20 in the continental United States.

Based upon results of this study, it was found that the effects of sexual materials upon sexual behavior had little effect or no change "in these behaviors": "In general, established patterns of sexual behavior were found to be very stable and not altered substantially by exposure to erotica. When sexual activity occurred following the viewing or reading of these materials, it constituted a temporary activation of individuals' preexisting patterns of sexual behavior."[12]

In terms of criminal and delinquent behavior, "statistical studies of the relationship between availability of erotic materials and the rates of sex crimes in Denmark indicate that the increased availability of explicit sexual materials has been accompanied by a decrease in the incidence of sexual crime."[13]

Statistical studies of the relationship described above in the United States presents a more complex picture: "During the period in which there has been a marked increase in the availability of erotic materials, some specific rates of arrest for sex crimes have increased (e.g., forcible rape) and others have declined (e.g., overall juvenile rapes)."[14]

The Commission makes the point that: "In discussions about obscenity and pornography, the fact is often overlooked that legal control on the availability of explicit sexual materials is not the only, or necessarily the most effective, method of dealing with these materials."[15]

Nevertheless, this view should be considered in light of specific instances which occur from time to time. For example, a young man who saw "Violated", a sex movie at the local theatre, left it determined

to "get a girl", and slugged a Lakewood girl with a wrapped brick a block from her home.[16] When she screamed, he darted behind the Lakewood Police Station where he was arrested and made a confession before the victim had notified police of the assault.[17]

"'This picture at the Lower Mall,' he told police, 'excited me. It showed a man who had stabbed a woman to death because she rebuffed him. I intended to rape the girl but her screams scared me off. I don't know what came over me.'"[18]

A more relevant question is by what means should the general problem of how to control the promotion of obscenity and pornography be approached. It seems clear that these controversial publications serve to increase sales by virtue of the controversy they create. The problem to be resolved is whether there should be greater control upon the direct advertising of obscene or pornographic materials, or whether greater controls should be placed upon the content of such publications, or upon the electronic media.

Radio and Television

In answering the question as to whether there should be a change in the regulation of obscenity and pornography, or of offensive speech, as the case may be, it might be worthwhile to consider the extent to which self-regulation of media takes place presently, and then consider where the need of government regulation may be most critical.

The need for regulation may be greater in the electronic media than in the print media simply because it is more difficult to censor

children's access to radio and television than to adult literature. The National Association of Broadcasters has recognized this problem, but, like the FCC, was previously unable to enforce any regulation of it as a result of the U.S. Court of Appeals decision in the WBAI case involving George Carlin and the seven words banned by the FCC.

Although this Court decision prevented any enforcement, the NAB guidelines take into account local standards and mores. The NAB Television Board of Directiors, at its September 16 meeting in Washington, unanimously approved revised language for Television Code IV-8. Generally, the new language states that Code subscribers "shall not broadcast any material which thay determine to be obscene, profane, or indecent". That language replaces the existing provision which prohibits material that is obscene, indecent, or profane as proscribed by law. The Television Board took note of the fact that because of last year's family viewing Court decision, guidelines in the area of programming cannot be enforced.

Board Chairperson Kathryn F. Broman, Springfield (Mass.) Television Corporation, commented: "I believe this language represents a step forward especially in view of the fact that we do have a Code that is strictly voluntary. This language does not prohibit television from treating adult themes in programming, but it does place the responsibility for what goes out over-the-air squarely on the shoulders of the individual subscriber."[19]

The new Code language reads:

> Subscribers shall not broadcast any material which they determine to be obscene, profane, or indecent.
>
> Above and beyond the requirements of law, broadcasters must consider the family atmosphere in which many of their programs are viewed.
>
> There shall be no graphic portrayal of sexual acts by sight or sound. The portrayal of implied sexual acts must be esssential to the plot and presented in a responsible and tasteful manner.
>
> Subscribers are obligated to bring positive responsibility and reasoned judgment to bear upon all those involved in the development, production, and selection of programs.[20]

In addition to the NAB regulation above, which for a time, the courts would not permit it to enforce against networks and local broadcast stations, there is also a 1948 federal statute against broadcasting obscene language, which can once again be enforced on the strength of the U.S. Supreme Court decision in the Pacifica Foundation v. FCC case. This law, which remains in effect, provides that: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more that $10,000 or imprisoned not more than two years, or both." (Section 1464 Communications Act of 1934, Ch. 645, 62 Stat. 769.)[21]

Since the Supreme Court reversed the Pacifica Foundation decision, presumably the seven-word prohibition would apply to television as well. Indeed the case of Al Hanf v. State of Oklahoma (560 P.2d 207 (1977)),

underlines the fact that some acts which are permitted in print are by state statute ruled a felony crime in the electronic media.

Billboards

No less important, though perhaps less pervasive, is the problem of obscenity and pornograpghy on billboards. Many states have laws which limit the content and degree of pandering possible in outdoor advertising, especially near highways. For example, in the state of Washington, any billboard must comply with its statute regulating public nuisances or be removed. (Wash. Leg. Svc., Ch. 55.)

A recent example of a billboard which might fall into a similar category is the Sea and Ski Suntan Lotion advertisement entitled: "The Tan You Want to Touch." It appeared in various locations during the year 1977. (It was modified in 1978). When Ogilvy and Mather, Inc., the advertising agency responsible, was asked in the summer of 1977 for permission to reprint a picture of the billboard in this work, the writer was asked in turn whether it would be published in a favorable or negative context. The writer responded that it would be in a favorable and definitely not a negative context.

The representative of Ogilvy and Mather then explained that it was the policy of the advertising agency to grant permission under such circumstances, and that there should not be any problem. The agency preferred, however, to consult Sea and Ski on the matter before making a final decision. The final answer was in the negative. No explanation was given.

Child Pornography

Like regulation of the air waves and transportation public ways, there is no First Amendment barrier to the control on sale or distribution of obscene or pornographic material. Such regulation can take place on the federal or state level, or on the local level through ordinances relating to zoning, licensing, public nuisances, or relating to a specific type of business such as adult bookstores or drive-in movies. Many states have laws prohibiting pornographic materials or materials harmful to minors, although some publications are also protected from child pornography laws.

One such case reached the U.S. Supreme Court earlier in 1978. In May of that year the Court distinguished children from a definition of the "average person" within the community by whose standards obscenity should be judged. The Court declared that it might very well reach a much lower "average" when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults (William Pinkus, DBA Rosslyn News Company v. United States, (1978).)

In the same case the Court reinforced its decision in Ginzburg v. United States, supra, with its pandering instruction to the jury. The lower court had permitted correctly the jury to consider the touting descriptions in the advertising brochures, along with the materials themselves, to determine whether the materials were intended to appeal to the recipient's prurient interest in sex. The jury was thus allowed to consider whether the pornographic

material constituted commercial exploitation or erotica, solely for the sake of their prurient appeal, as was the case in Ginzburg v. United States (supra).

While child pornography is classified in a category by itself, and precluded from consideration of the character of a community, there are still qualifications on the censorship, especially prior restraint, of child pornography. For example, late in 1977, New York officials were preliminarily enjoined by a federal district court from enforcing the state's new child pornography law against the publisher and sellers of Show Me, a book designed for use by parents in educating their children about sex. (St. Martin's Press v. Carey, 3 Med. L. Rptr. 1598 (1977).)

The statute, New York Penal Law Section 263.15, prohibits the promotion of a "sexual performance by a child" under the age of sixteen. The book, which contains nude photographs of children under 16 years of age and which is explicit in its depiction of human sexuality, comes within the "clear language" of the statute, according to the court (supra).

However, the court noted that St. Martin's has not yet been investigated, arrested, or prosecuted for violating the statute which prohibits the promotion of a sexual performance by a child. Not only was the preliminary injunction prohibiting the sale and distribution of the book a case of unconstitutional prior restraint, but the case raises substantive due process questions, since the photographs in the book were taken outside the U.S. and prior to the

effective date of the statute (supra).

A film which has come under attack as a case of child pornography is entitled "Pretty Baby". Its star, well known model Brooke Shields, was twelve years of age at the time the film was made. Brooke explains: "It's only a role... I'm not going to grow up and become a prostitute." Brooke's "nude" scenes were shot with her wearing a body stocking, with one exception. When Violet (the role Brooke Plays) chastely poses naked for the photographer Bellocq (Keith Carradine), the French director closed the set to everyone but himself and the cinematographer. The R-rated film has been banned outright in the Canadian provinces of Ontario and Saskatchewan.[22]

Hearings have been held in the Senate Subcommittee on Juvenile Delinquency on the subject of "Protection of Children Against Sexual Exploitation",[23] and the Senate Committee on the Judiciary has issued a report on the "Protection of Children Against Sexual Exploitation Act of 1977".[24]

Conclusion

In the Roth case of 1957 and the Miller case of 1973, the Supreme Court twice established three criteria for determining permissible limits of obscenity and pornography. In each case the first criterion, that of appealing to the prurient interest, remained the same. The second criterion changed from exceeding the standards of candor in the representation of sexual matters in Roth to portraying sexual conduct in a patently offensive manner in Miller. The third criterion changed from being utterly without redeeming social value in Roth to lacking any serious literary, artistic, political,

or scientific value in Miller.

On the basis of court precedent, it is reasonable to conclude that there can be greater regulation of time, place and manner, than of content, where questions are raised as to the legality of publishing or broadcasting certain controversial matter considered to be obscene or pornographic. Furthermore there is more limited First Amendment protection of pornographic materials when they involve use of advertising, air waves, billboards in public places, obscenity for children or by children, or any form of commercialization intended to increase the circulation of the publication.

Government regulation of radio and television, billboards, and child pornography does not violate the First Amendment. In each case these activities involve captive audiences to some extent, and they constitute acts by virtue of the fact that they are staged for the media.

Consequently, regulation of such activities meets the most rigid of all First Amendment standards--the Absolute Standard. Major proponents of the Absolute Standard, such as Justices' Black and Douglas, would agree to such limitations on the First Amendment when they involve conduct or commercialization, lacking in the expression of individual ideas.

Taking these acts in reverse order, though in equally important order, child pornography may be regulated by the government without violating the First Amendment because children are viewed as lacking in adult ability to make choices. Portrayal of child pornography is conduct, not speech. Such conduct is unrelated to the expression

of ideas, and therefore it is undeserving of First Amendment protection. In cases such as this, surely First Amendment protection is a privilege rather than a right.

Government regulation of billboards, furthermore, poses no constitutional problems of any kind. In the case of Lehman v. City of Shaker Heights (418 U.S. 298 (1974)), the Court pointed out specifically that the prohibition of a certain class of advertisements on billboards results in no equal protection violation, but rather that it involves the protection of a captive audience. (418 U.S. 298, 302 (1974).) Moreover it was emphasized in Railway Express Agency, Inc. v. New York that billboard displays in Times Square constitute serious traffic hazards (336 U. S. 106, 110 (1949).)

Finally, however, it should be noted that a case can be made for the government regulation of worthless and objectionable commentary on radio, and of any obscene or pornographic conduct which may be shown on television. In neither case would restrictions on the activity or conduct violate the First Amendment. Again it is simply a matter of justifying the regulation. Once that task is accomplished, there is no intrusion on the First Amendment by virtue of implementing the regulation under consideration.

Indeed the Court has listed cendorship among the areas whereby even prior restraint may be impose constitutionally when conditions serve such governmental restraint and interest. (See Near v. Minnesota, 283 U.S. 697 (1931); Brandywine-Main Line Radio v. FCC, 473 F. 2d 16 (CADC 1972).)

The Court places severe restrictions upon censorship in the form of prior restraint, however. (See Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).)

The airwaves are limited, obsiously. Consequently, to some extent a captive audience is involved. Once this fact is accpeted, there is no absolute value to be considered, unless it is the protection of the privacy rights of a captive audience and some consideration for the interests of the people in the captive audience. This limitation would not be true of cable television, however.

While it is possible to turn to another channel if one objects to the programming on the one viewed at the time, there remain a limited number of changes possible. These limited options raise questions concerning the needs and interests of the viewer and listener. However, such conditions may very well be changed by cable television which increases substantially the number of options available.

Furthermore, when it can be demonstrated that there is a casual relationship between antisocial conduct displayed or portrayed in the programming, and similar conduct emulated by the viewers, a case for regulation can be made in the form of individual tort action, Such an inducement for self-regulation occurred in the case NBC v. Niemi (98 S.Ct. 705 (1978)), where self-regulation was found to provide insufficient protection for the consumer. Here a television network's failure to show irreparable injury caused by a California court of appeal decision requiring trial in damages

action brought against the network for its broadcast of a movie "Born Innocent", that allegedly provoked an assault on the plaintiff, was found to warrant the Circuit Justice's denial of the network's application for a stay of appeal of the court decision. Upon retrial, however, a San Francisco judge dismissed the case in August 1978, ignoring high Court instructions to send it to a jury and facilitating its possible return to the United States Supreme Court.

This case, like the case of Ronney A. Zamora in Florida, involves negligence action seeking damages for the television network's broadcast of a movie that allegedly inspired the assault upon the plaintiff. Thus the assumption has been made that at least violence and rape seen on television may induce violence and rape on the part of some viewers. 98 S.Ct.705 (1978). The high Court upheld the stay.

In the 1978 case of First National Bank of Boston v. Bellotti, United States Supreme Court Chief Justice Burger explains that newspapers and broadcasting stations could be said to represent a larger threat to what he calls "valid interests in the electoral process than other corporations". Burger further expresses his personal view on the power of the press by pointing out that "large media conglomerates" had no special claim on Constitutional liberties, including First Amendment rights of free expression (Ibid).

Media conglomerates, however, have been broken up by the courts in the past, and this practice continues to occur. Furthermore, when private tort action may be brought against television network stations for damages resulting from violent or criminal acts committed,

surely the FTC and FCC have the power, initiative, and First Amendment support in regulating obscene expressions, both actions and words.

Billboards can be regulated easily on the state and local level, and even child pornography could be controlled at that level as well. But when advertising or the airwaves are involved, there may be an obligation for the government to curtail more than child pornography and other public displays, such as billboards.

A strong case, nevertheless, can be made and has been made for deregulation of the airwaves. For example, House communications subcommittee leaders proposed in June 1978 granting permanent licenses to radio and television owners, banning any censorship of program content, and eliminating the review process that forces stations to air news and public service programs. In the form of a 217 page bill, the proposal constitutes the most dramatic example in many years of a serious effort to return to "free market" economic competition in place of regulation in "the public interest" (H.R. 13015, 95th Cong. 2d Ses.).

The subcommittee had negotiated the bill for three years with the broadcasting industry, the American Telephone and Telegraph Co. (AT&T), and the FCC, the agency which oversees both. Under such a proposal, the FCC would be restructured, and would lose much of its power. Although the bill may not reach the House floor before 1979, or the Senate before 1980, most of the major elements have the consent of the industries affected.

It has been estimated that deregulation would save the broadcast and telephone industries, which are the most powerful lobbies on FCC issues, hundreds of millions of dollars in administration, record-keeping, and legal costs. Furthermore, while one barrier to the intrusion of cable television upon networks and local stations would be removed, removal of one restrictive regulation would not leave broadcasters vulnerable to cable television. Indeed sufficient protection has been and can be provided by enforceable state laws which deny cable television the use of network and station productions without their consent.

Finally, the security of having permanent licenses would give station owners a windfall increase in the resale value of their stations because new stations are technically impossible in most markets. Consequently, new entrants would have to buy from present owners.

Among other things, this bill would ban any censorship or other regulation of program content. It would also eliminate any power to censor or punish stations for airing sex or violence or racial, ethnic, or other stereotypes. In light of the newly approved alternative of private tort actions against such offenses, efforts on the part of a federal regulatory agency may be duplicative and unnecesssry.

Footnotes

[1]Milton R. Konvitz, Fundamental Liberties of a Free People (1957), pp.163-169.

[2]Roth v. United States, 354 U.S. 467 (1957).

[3]Henry P. Monaghan, "First Amendment Due Process," 83 Harvard Law Review (1969), pp.520-524.

[4]New York Times (June 12, 1977).

[5]For a concise history of obsenity and pornography, see Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Also see Daniel M. Rohrer, Justice Before the Law (Skokie, Ill.: National Textbook Co., 1971), pp. 215-217, for an earlier history.

[6]Ted Morgan, "United States Versus the Princess of Porn," New York Times Magazine (Mar. 6, 1977), p. 16.

[7]Larry Flynt, "The Hustler Hassle," Speech Communication Association of America Convention Program sponsored by the Communication and Law Committee and Commission of Freedom of Speech (Dec. 3, 1977), Washington, D.C.

[8]George Vecsey, "A Pornography Publisher Says He Has Changed, but Not Into a Traditional Christian," New York Times (Feb. 2, 1978), p. A16.

[9]Wayne King, "Larry Flynt, Owner of Hustler, Is Shot Near Georgia Court," New York Times (Feb. 7, 1978), p. 1.

[10]Ibid, pg. 73.

[11]Tom Goldstein, "Survey Finds High Court Decision Fails to Spur Convictions on Smut," New York Times (Mar. 20, 1977).

[12]The Report of the Commission on Obscenity and Pornography (New York: Bantom Books, 1970), pp. 26-29.

[13]Ibid, p. 30.

[14]Ibid, p. 31.

[15]Ibid, p. 32.

[16]Charles Lucy, Scripps-Howard Writer, Cleveland Press (Sept. 28, 1954), p. 1.

[17] Ibid

[18] Ibid

[19] "New TV Code Obscenity Language Approved By NAB Television Board of Directors," Code News (Oct. 10, 1977).

[20] Ibid

[21] "Appendix C," Communications Act of 1934 (Washington, D.C.: U.S. Government Printing Office, 1971), p. 131

[22] Kristin McMurran, People (May 29, 1978), p. 42.

[23] Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, U.S. Senate, 95th Congress, 1st Session, Chicago, Ill., May 27, 1977, June 16, 1977 (Washington, D.C.: U.S. Government Printing Office, 1978).

[24] Report of the Committee on the Judiciary, U.S. Senate on S. 1585, Report No. 95-438, 95th Congress, 1st Session, Sept. 15-16, 1977 (Washington, D.C.: U.S. Government Printing Office, 1977).

*Also see "Sexual Exploitation of Children," Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, U. S. House of Representatives, 95th Congress, 1st Session, May 23, 25, June 10, and September 20, 1977 (Washington, D. C.: U. S. Government Printing Office, 1977).

**For a United Kingdom case of child pornography, which was appealed to and conviction upheld by the European Court of Human Rights in Strasbourg, see Richard Handyside v. United Kingdom in Freedom of Speech and Human Rights: An International Perspective (1979), by Daniel M. Rohrer (Dubuque: Kendall/Hunt Publishing Co., 1979). Another version of the article above, furthermore, may be found in Mass Media, Freedom of Speech, and Advertising: A Study in Communication Law, by Daniel M. Rohrer (Kendall/Hunt Publishing Co., 1979).